INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D130/99

Salaries Tax – nature of employment – whether services were performed in Hong Kong – section 8(1A)(b) of the Inland Revenue Ordinance (' IRO').

Panel: Andrew Halkyard (chairman), Peter R Griffiths and John Lee Luen Wai.

Date of hearing: 17 February 2000.
Date of decision: 28 February 2000.

The taxpayer was employed by Company A as senior accountant during the period 1 April 1996 to 9 May 1996. He was later employed by Company B as senior projects manager during the period 1 June 1996 to 31 March 1997. During the year the taxpayer travelled extensively to China and performed services for both Company A and Company B in China.

The taxpayer gave sworn evidence. The taxpayer agreed that his employment with Company A and with Company B both located in Hong Kong and in light of his personal and family circumstances he was not a visitor to Hong Kong. Although the taxpayer contended that he did not render any services in Hong Kong for either Company A or Company B during the year ended 31 March 1997, the taxpayer admitted that during the period 5 to 9 May 1996, the taxpayer participated in a regional conference held by Company A in Hong Kong and in early June 1996, the taxpayer went to Company B to meet his fellow employees and managers and became acquainted with the business operations of Company B and has stayed in Hong Kong for another six days to prepare for his long-term assignment to China.

The sole issue for the Board to decide is whether during the year of assessment 1996/97, and in terms of section 8(1A)(b) of the IRO, the taxpayer was exempt from salaries tax on the basis that the taxpayer performed no services in Hong Kong for Company A and for Company B in connection with his employment.

Held :

1. The Board disagreed totally with the taxpayer that since the nature of his employment as a senior accountant and as a senior projects manager must mean that his services were performed in China where his employers' projects were located. The Board considered this is a very narrow view of the concept of ' services' .

2. On the basis of the taxpayer' s testimony that the taxpayer was on duty in Hong Kong and performing work for both his employers for which he was paid, it would be unreal to regard the time spent by the taxpayer in Hong Kong during these periods as not performing and services in connection with his employment for either Company A or Company B. The Board therefore found that the taxpayer did perform services in Hong Kong in connection with his employment for both Company A and Company B during the year of assessment 1996/97.

Appeal dismissed.

Chow Cheong Po for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

1. This is an appeal against a salaries tax assessment raised on the Taxpayer for the year of assessment 1996/97.

2. The basic facts, which we so find, are set out in the Commissioner' s determination dated 31 August 1999. This shows that the Taxpayer was employed by Company A during the period 1 April 1996 to 9 May 1996. He was later employed by Company B during the period 1 June 1996 to 31 March 1997. During the year the Taxpayer travelled extensively to China and performed services for both Company A and Company B in China. During the year the Taxpayer did not pay any tax on his employment income in China.

3. During the course of the Board hearing the Taxpayer gave sworn evidence. He stated that:

1. He agreed that his employment with Company A and with Company B were both located in Hong Kong.

2. He agreed that in light of his personal and family circumstances he was not a visitor to Hong Kong.

3. Although he contended that he did not render any services in Hong Kong for either Company A or Company B during the year ended 31 March 1997, he admitted:

(a) Re Company A: During the period 5 to 9 May 1996, when he was in Hong Kong, he participated in a regional conference held by Company A

in Hong Kong. Staff from Company A's associated companies throughout the Asian region, including Hong Kong, also attended. During this period, the exact date being unclear, an 'incident' occurred, he argued with Company A, and Company A asked him to leave his employment.

(b) Re Company B: His service for Company B commenced on 1 June 1996. During the first week of his employment, he went to Company B's offices to meet his fellow employees and managers and become acquainted with the business operations of Company B. His first trip to China took place on 8 June 1996. He returned to Hong Kong on 9 June 1996 and stayed in Hong Kong for another six days before his next trip to China. He stated that, during the six day period from 9 to 15 June 1996 he had to attend to some private matters so as to prepare for his long-term assignment to China. He did not take any holidays during this period. Although Company B had various projects in China, he stated that he could not remember whether, during the initial periods of this employment, he was given papers to study so as to prepare him for his forthcoming assignments in China.

4. At the conclusion of the Taxpayer's evidence, we indicated that we would not need to consider the Revenue's submission, that we would dismiss the appeal, and provide written reasons later. Our reasons are as follows.

5. In light of the Taxpayer's admissions at points 1. and 2. above, the sole issue for our decision is whether during the year of assessment 1996/97, and in terms of section 8(1A)(b) of the Inland Revenue Ordinance, the Taxpayer was exempt from salaries tax on the basis that he performed no services in Hong Kong for Company A and for Company B in connection with his employment. In this regard, documents produced by the Revenue from Company A and Company B indicate that the Taxpayer did perform services in Hong Kong for each company during the year. The Taxpayer maintained that these documents were wrong. He insisted that he did not perform services in Hong Kong.

6. For the purposes of our decision, we need not decide whether the statements made by Company A and Company B were correct. On the basis of the Taxpayer's own sworn evidence (see points 3.(a) and (b) above), it is clear that he did perform services for both companies in connection with his employment in Hong Kong during the year of assessment. The Taxpayer sought to convince us that he did not because the nature of his employment as a senior accountant (Company A) and as a senior projects manager (Company B) must mean that his services were performed in China where his employers' projects were located. This is a very narrow view of the concept of 'services' and we disagree totally with the Taxpayer on this matter. In our view, and at the very least, during the period 6 to 9 May and in early June 1996 the Taxpayer was on duty in Hong Kong and performing work for both his employers for which he was paid. It would be unreal

to regard the time spent by the Taxpayer in Hong Kong during these periods as not performing any services in connection with his employment for either Company A or Company B.

7. We note also that we were not impressed with the Taxpayer's answers and demeanour when he stated that he could not remember whether he had to study any papers in Hong Kong relating to China projects when he commenced employment with Company B in early June 1996. We find it incredible that the Taxpayer did not do so and, if necessary, we would find that he did. If necessary, we also find that the documents produced before us by the Revenue support our decision. However, in the result we need merely to conclude that, on the basis of the Taxpayer's testimony before us, he did perform services in Hong Kong in connection with his employment for both Company A and Company B during the year of assessment 1996/97. This is sufficient for us to dismiss the appeal and we so order.